MOTION FILED
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(3)

No. 99-1368

In the
SUPREME COURT OF THE UNITED STATES

CITY OF AUSTIN, TEXAS,
Petitioner,

v.

SOUTHWESTERN BELL VIDEO SERVICES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF LOCAL GOVERNMENTS FOR LEAVE TO FILE AND BRIEF AMICI CURIÆ IN SUPPORT OF CITY OF AUSTIN's PETITION FOR WRIT OF CERTIORARI

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March 2000

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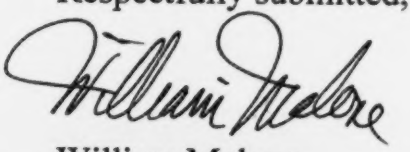
MOTION OF LOCAL GOVERNMENTS TO FILE BRIEF AMICI IN SUPPORT OF CITY OF AUSTIN's PETITION FOR WRIT OF CERTIORARI

The National Association of Telecommunications Officers and Advisors (NATOA), the Texas Coalition of Cities For Utility Issues (TCCFUI), and the Michigan Coalition to Protect Public Rights-of-Way (PROTEC) move for leave to file the accompanying brief amici curiæ in support of the City of Austin's petition for writ of certiorari.

Counsel for the City has consented. Counsel for the Respondent company has withheld consent. The Cable Act of 1984, as amended, 47 U.S.C., Title 5, Subchapter V-A, relies on local franchising authorities in significant respects to regulate cable television. Section 621(b) of the Act, 47 U.S.C. § 541(b), at issue here, is part of the Congressional scheme focussed on implementation of intergovernmental regulation. The amici are associations representing franchising authorities as defined in Section 602(10) of the Act, 47 U.S.C. § 522(10). The brief amici being tendered herewith argues the Section 621(b) issue from a perspective broader than plain meaning.

Respectfully submitted,



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INTERESTS OF AMICI[1]

Amici are associations of cities and other local governmental and inter-governmental units and of officials thereof.[2] These local governments are the franchising authorities[3] that issue to cable operators under state laws the cable franchises that Section 621(b) of the Cable Act, 47 U.S.C. § 541(b), requires cable operators to have before they can provide cable service. These local governments implement in whole or in part, under the guidelines of the Cable Act, Sections 611 (Cable Channels for Public, Educational, or Governmental Use) and 612 (Cable Channels for Commercial Use), Sections 621-27 of Part III (Franchising and Regulation), Section 631 (Protection of Subscriber Privacy), and Section 632 (Consumer Protection and Customer Service), 47 U.S.C. §§ 521, 522, 541-47, 551-552. This franchising authority is preserved from federal preemption as provided in Section 636 (Coordination of Federal, State, and Local Authority) and 637 (Existing Franchises), 47 U.S.C. §§ 556, 557. See also, City of Dallas v. FCC, 165 F.3d 341, 347 (5th Cir. 1999), limiting the federal agency's

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[1] The written consent of Petitioner to the filing of this brief amici has been filed with the Clerk of this Court.

[2] No part of this brief was authored in whole or in part by a counsel for either party, and no person or entity, other than the *amici curiæ*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Petitioner City of Austin is a fiscal agent to TCCFUI, one of the amici.

[3] "[T]he term 'franchising authority' means any governmental entity empowered by Federal, State or local law to grant a franchise." Section 602(10) of the Cable Act, 47 U.S.C. § 522(10).

invasion of local authority under Section 601(c)(1) of the Telecommunications Act of 1996, 47 U.S.C. § 152 nt.

Amici are the National Association of Telecommunications Officers and Advisors (NATOA), the Texas Coalition of Cities For Utility Issues (TCCFUI), and the Michigan Coalition to Protect Public Rights of Way (PROTEC). Amici here are among those amici curiæ who filed a brief amici curiæ in support of the City of Austin in the Fifth Circuit.

QUESTIONS PRESENTED

Where Congress made regulation of cable television under the Cable Act applicable only to *cable operators* and defined *cable operators* as persons and their affiliates who provide *cable service* over a *cable system*, and

Where the Respondent indisputably offered *cable service* to the public; the District Judge found that the Respondent "appears in all functional respects to be a *cable operator*;" and the video signals were selected by Respondent at its cable headend and were carried transparently over transmission facilities owned by its corporate affiliate and located within the public rights-of-way to its in-building cable distribution facilities for delivery to its cable subscribers as described in the statutory definition of *cable system* --

(1) Whether this Court should review the Fifth Circuit majority's conclusion that Respondent was not a *cable operator*, where that finding would have the effects of

> (i) wholly exempting from regulation under the Cable Act an operator's provision of cable services by reason of its parent's electing to divide up ownership of the cable system among affiliated entities, and
>
> (ii) radically diminishing the local governments' rôle in the regulation of cable television that Congress sought to preserve in the Cable Act; and

(2) Whether the majority's disregard of the express limitations the Federal Communications Commission placed on application of the Act to such systems in a contemporaneous collateral proceeding violates this Court's Chevron doctrine and the doctrine of separation of powers embodied in the U.S. Constitution.

STATUTES INVOLVED

This case involves interpretation and application of the Cable Act of 1984, as amended, which is Title VI of the Communications Act of 1934 and is codified as 47 U.S.C., Ch. 5, Subchapter V-A. The directly relevant statutory provisions are printed in the appendix to the petition at App. 36-37.

SUMMARY OF THE ARGUMENT

The courts below erred in holding that Respondent SWBV, the operator of a video distribution system that was indisputably offering "cable service" to subscribers in dispersed apartment houses, was not a "cable operator" within the definition in Section 602(5)(A) of the Cable Act, 47 U.S.C. § 522(5)(A). App. 4 n.6. The courts reached this conclusion notwithstanding the district court's having found that SWBV appears "in all functional respects to be a cable operator." App. 27.

In holding that SWBV was not a cable operator because it did not own the totality of its video distribution system, the courts below seized on the fact the cable connecting SWBV's "headend" with its distribution facilities located within the apartment houses was not owned directly by SWBV, but instead was owned by SWBT, its affiliated local telephone company. The Fifth Circuit failed to give effect to the key phrase in the statutory definition of cable operator, viz.:

> a 'cable operator' means any person ... (A) who provides cable service over a cable system and directly *or through one or more affiliates* owns a *significant interest* in such cable system....

(emphasis supplied). Because SWBT was undeniably an affiliate of SWBV within the meaning of Section 602(2)(affiliate), 47 U.S.C. § 522(2), the Fifth Circuit should have imputed SWBT's ownership of the

connecting cable emplaced in city streets to SWBV. Thus, SWBV would have owned not only the significant interest in the cable system required by Section 602(5)(A) but by imputation the entire cable system as well. App. 4 nn.6-7.

The majority failed to consider the impact of its definitional holding in the context of Section 621(b), 47 U.S.C. § 541(b), on the administration of the Act as a whole. Because the Cable Act regulates only cable service provided by "cable operators," the unavoidable collateral effect of the majority's holding that SWBV was not a cable operator was to totally exempt SWBV's cable service from regulation under the Cable Act. The majority also failed to consider the relationship between its rationale and that applied by the Federal Communications Commission in its contemporaneous 4-1 decision in Entertainment Communications, Inc., 13 F.C.C. Rcd 14277, 12 P&F C.R. 800 (1998) ("ECI"), now pending before the Seventh Circuit on rehearing. The ECI case involved a system similarly configured to SWBV's, except that the cable connecting ECI's cable headend to its distribution facilities in dispersed apartment houses was owned by an unaffiliated telephone company. The Commission expressly placed its holding that ECI was not a cable operator on the condition that "there is absolute separation of ownership between ECI and Ameritech and there is nothing more than the carrier-user relationship between them...." Id. at 14311, 12 P&F C.R. at 821. The District Court disregarded this limitation, and the majority opinion ignored it.

The decisions of the courts below proceeded from a cramped construction of the statutory language, and the majority failed to properly consider the policy determinations implicit in its holding that had been recognized in the decision of the federal agency. While in the end the courts below could properly have found the plain language of the statute to override agency policy, the narrow focus of the majority's opinion below — excluding the agency's policy pronouncement — did not even consider the degree of judicial deference appropriately due agency policy under Chevron[4] and the constitutional separation of powers.

ARGUMENT

In 1984 Congress adopted a carefully balanced legislative scheme for regulation of the delivery of cable services to the public. According to the majority opinion below, a corporate provider of cable services may evade that scheme by apportioning ownership of its cable system among its affiliates. An apprehension of such a result underlies the FCC majority's imposition of seven conditions on its ruling in the similar ECI case – an apprehension that was made more explicit in the thoughtful dissenting opinion of Commissioner Tristani. The majority below adverted to neither opinion at the agency level. Because the opinion in the court below opens the way to wholesale evasion of the Congress' "national policy," resulting in

[4] Chevron v. NRDC, 467 U.S. 837 (1984).

destabilization of the comprehensive statutory plan for the regulation of the cable industry, it is important that this Court review the determination of the Court of Appeals.

I. The Majority's Decision is Unfaithful to Congress' Language and Intent.

The majority's decision holding that Respondent SWBV was not required to have a local cable franchise under Section 621(b) of the Cable Act, 47 U.S.C. § 541(b), because SWBV was not a "cable operator," fails to accurately give effect to either the language or the intent of the definition in Section 602(5)(A) of the Act, 47 U.S.C. § 522(5)(A).

1. The Courts' Construction of Section 602(5) Contradicts the Regulatory Purpose of the Act as a Whole.

The Act "establishes a national policy that clarifies the current system of local, state and Federal regulation of cable television. This policy continues reliance on the local franchising process as the primary means of cable television regulation...." H.R. Rep. No. 98-934 to accompany H.R. 4103 at 19 (1984). This purpose is reflected in subsections (1)-(3) of Section 601 (Purpose) of the Act, 47 U.S.C. § 521. Because the Cable Act regulates only cable service provided by "cable operators," the unavoidable collateral effect of the majority's construction of the statutory definitions in Section 602(2) and (5)(A) of the Act, 47 U.S.C. § 522(2) and (5)(A), is to invite a whole class of

providers of cable services to exempt themselves from all regulation under the Cable Act by purposefully reconfiguring their respective systems.

The Act conditions a cable operator's carriage of programs from licensed television broadcast stations on the operator's having obtained a local franchise in Section 621(b), 47 U.S.C. § 541(b). But that is just one of many consequences of the system operator's falling within the definition of a "cable operator" in Section 602(5), 47 U.S.C. § 522(5). The Federal Communications Commission, in its contemporaneous collateral decision in Entertainment Connections, Inc.[5] enumerated pervasive "consequences under the Communications Act and the Commission's rules" additional to the local franchising requirement at issue there and in the instant case. The majority's decision fails to reconcile its unnatural reading of the statutory definition with the structure and purpose of the Cable Act as a whole to regulate provision of cable services to the public.

2. The Courts' Cramped Construction of Section 602(5) Fails to Effect Congress' Intent to Inclusively Regulate Cable Service.

Because Congress intended the Act to protect all consumers of cable service, it drafted the Act's definition of "cable operator" to be broadly inclusive,

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[5] 13 F.C.C. Rcd 14277, 14278 & n.6, 12 P&F C.R. 800, 801 & n.6 (1998) ("ECI"), now pending before the Seventh Circuit on rehearing of its decision in City of Chicago v. FCC, 199 F.3d 424 (7th Cir. 1999).

rather than crampingly narrow. Congress intended the Cable Act to establish a national framework for the evolving "cable industry" generally, H.R. Rep. No. 98-934 at 20, and "a national policy to guide the development of cable television" and to "encourage the growth and development of cable systems." Id. at 40. This intent is apparent in Congress' drafting of the two pivotal definitions in Section 602 (Definitions) of the Act, 47 U.S.C. § 522. The majority opinion below imports some common law concept of ownership (App. 5 n.8; cf. dissent, id. at 9 n.3), but the plain language of the pertinent statutory definitions compels the inclusion of sister subsidiaries, such as SWBV and SWBT here, which are under common ownership and control. App. 4 n.6. Congress said in Section 602 that

> For the purposes of this title [VI] –
>
> * * *
>
> (5) the term "cable operator" means any person *or group of persons* (A) who provides *cable service* over a *cable system* and directly *or through one or more affiliates* owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;
>
> * * *

(emphasis supplied). In turn Congress defined

> (2) the term "affiliate", when used in relation to any person, [to mean]

> another person who owns or controls, is owned or controlled by, *or is under common ownership and control with*, such person;
>
> * * *

(emphasis supplied).

It is difficult to imagine a more inclusive definition of cable operator than Congress employed. That definition reaches operators providing cable service directly or through an affiliate. While the majority opinion below seemed to think that the "affiliate" portion of the definition reached provision of cable service only through subsidiaries and not sister subsidiaries, App. 5 n.8, the last phrase in Section 602(2)'s definition of *affiliate* "another person ... under common ownership or control with[] such person" unmistakably includes sister subsidiaries under common ownership and control.

Certainly Congress intended to place under regulation a system configured as SWBV had elected to configure its system. There is no evidence in the text or legislative history of the Act that Congress intended to permit a cable operator to evade the Cable Act by inserting a passive section of transmission line between the operative ends of his video distribution system. Most certainly, Congress did not intend that this exemption could be obtained, as here, by the corporate parent's election to have such a section constructed by a sister subsidiary. The Federal Communications Commission's decision and Commissioner Tristani's dissent in ECI recognized the threat to

the regulation of cable service posed by cable operators' electing to transfer segments of their respective transmission systems to separate corporate entities. ECI, supra, at 14311 and 14318, 12 P&F C.R. at 821, 824.

The structure of Section 602 (definitions) is further evidence that Congress did not intend to place exemptions based on system configuration in the definition of "cable operator." SWBV's system clearly falls within the general definition of "cable system" in subsection (7) ("a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service ... to multiple subscribers within a community..."). Congress placed in the lettered paragraphs of subsection (7) exemptions based on system ownership, use, and configuration. See H.R. Rep. No. 98-934 at 44 ("There are four specific exemptions to the term 'cable system'...."). None suggests that one person must own all the facilities that constitute a "system." Subsection (5) in contrast addresses the question of *who* is the operator of the system. The majority's intimation that the holding company might be the cable *operator* here, App. 6 n.9, strains against the connotations of "operator" and would introduce an unnecessary complication into effective regulation of cable services on both the federal and local levels.

There is no dispute that SWBV provides *cable services* to the public. App. 4 n.6. Congress, however, structured the Cable Act so that all federal regulation of the provision of cable services is achieved through

the regulation of "cable operators." It is plain from the statutory definition that Congress intended to sweep within the regulatory ambit of the Cable Act all substantial providers of cable services. The majority's construction of Section 602(2) and (5) frustrates this Congressional intent.

3. The Courts' Exemption of Such Systems Undercuts Local Regulation.

Finally, the majority's crabbed construction of Section 621(b), 47 U.S.C. § 541(b), that exempted SWBV from the federal requirement to obtain a local franchise for cable services, was inconsistent with the statutory scheme of the 1984 Cable Act reflected in Section 601 (Purposes) of the Act, 47 U.S.C. § 521, and its legislative history. Subsections (1) and (3) demonstrate that Congress wrote comprehensively to "establish a national policy concerning cable communications" and to "establish guidelines for the exercise of Federal, State, and local authority" with respect thereto. "This policy continues reliance on the local franchising process as the primary means of cable television regulation...." H.R. Rep. No. 98-934 at 19. Cf. City of Dallas v. FCC, supra, at 348.

Section 621(b)'s requirement for a local franchise is critical to the efficacy of Congress' comprehensive scheme for cable regulation. Local franchises are integral to the operation of Sections 611 (Cable Channels for Public, Educational, or Governmental Use), 612 (Cable Channels for Commercial Use), 613 (Ownership Restrictions), 617 (Sales of Cable Systems), 621-27 (Part III-Franchising and

Regulations), 631 (Protection of Subscriber Privacy), 632 (Consumer Protection and Customer Service), 634 (Equal Employment Opportunity), 636 (Coördination of Federal, State, and Local Authority), and 637 (Existing Franchises), 47 U.S.C. § 521-23, 527, 541-47, 551-52, 554, 556-57.

III. THE MAJORITY'S DISREGARD OF THE AGENCY'S EXPRESSION OF LEGISLATIVE POLICY VIOLATES CHEVRON AND THE SEPARATION OF POWERS.

Amici concur with the City of Austin that the majority's construction of the term "cable operator" is inconsistent with the language of the carefully crafted definitions of the Act.

But, separately, the majority opinion has ignored the expression of a legislative policy embodied in paragraphs 3 and 73 of the Federal Communication Commission's order in ECI. In so doing, the majority violated the doctrine of separation of powers that assigns to the legislative branch the enunciation of policy, as distinguished from the judicial function of adjudication. The courts may not ignore expressions of legislative policy adopted by the agency, so long as that policy is within a valid delegation by Congress. To do so violates the doctrine of separation of powers which consigns the legislative function to branches of government other than the Article III courts. Cf. Mistretta v. U.S., 488 U.S. 361, 392 (1989) (recognizing limits on the courts' competency to make "political judgments").

As an independent agency, the FCC possesses some powers that are quasi-legislative and some that are quasi-judicial. E.g., Town of Deerfield, N.Y. v. FCC, 992 F.2d 420 (2d Cir. 1993). The Court need not pause here to consider whether the Commission's order in ECI – formally a declaratory ruling – is in form quasi-legislative or adjudicative, for it historically has been thought to be a virtue of the administrative process that the agency has the discretion to formulate future policy either by rule making or by adjudication. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 291-95 (1974), citing the plurality opinion in NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), and SEC v. Chenery Corp., 332 U.S. 194 (1947) (Chenery II). The ECI case involved a similarly configured system, except that the connecting cable under the streets was owned by the local telephone company, AMERITECH, which was unaffiliated with ECI. The Commission ruled that ECI was not a cable operator. Significantly, however, the Commission specifically limited its holding to the instance where "there is absolute separation of ownership between ECI and Ameritech and there is nothing more than the carrier-user relationship between them...." Id. at 14311, 12 P&F C.R. at 821 (¶ 73[i]). The clear implication is that the Commission would have ruled otherwise on the facts of the situation here, where SWBV and SWBT are sister subsidiaries.

To the extent that the ECI embodies the proper discharge of a policy-making rôle by the agency, the courts step out of their judicial rôle to reject or ignore a legislative policy within the agency's delegated

authority. Unlike the courts below, the Commission recognized that a decision on the question of whether ECI was a cable operator or not had ramifications beyond the issue of the applicability of the single section of the Act before the district court. Id. at 14311, 12 P&F C.R. at 801 (¶ 3 & n.6). The majority opinion below, by choosing to totally ignore the policy aspects of the agency decision implicitly moved from a judicial rôle to a legislative one.

Amici have argued to the Seventh Circuit that the agency reached the wrong result in ECI, and Amicus PROTEC has argued additionally that the Commission lacked jurisdiction to construe Section 621(b) under the line of deference cases running from NLRB v. Hearst Publications, 322 U.S. 111, 130 (1944), to Adams Fruit Co. v. Barrett, 494 U.S. 638, 649-50 (1990). Be that as it may, the district court's failure to reconcile its decision with the agency's express conditions, inserted to implement the Commission's view of the statutory policy, and the Fifth Circuit majority's total failure to consider the agency's policy were impermissible intrusions by omission into the policy-making area. While the courts below might in the end have determined that the Commissions' policy was foreclosed by the plain meaning of the statutory language or otherwise, the courts below were obliged at least to consider the appropriate degree of deference to be given the agency decision under Chevron, if any, and under the doctrine of separation of powers.

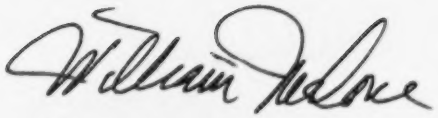
Moreover, the District Court's contradiction of the agency's non-affiliation limitation on its holding

reflects a judicial failure to respect the agency's potential policy-making rôle -- if not an impermissible collateral overruling of the agency's ruling and an invasion of the Seventh Circuit's exclusive jurisdiction on appeal therefrom under 28 U.S.C. § 2112 (Record on review and enforcement of agency orders), which consigns review of agency decisions under the Hobbs Act procedure, now 28 U.S.C. § 2346 (Certification of record on review), to a single court of appeals.

CONCLUSION

This case and the ECI case, taken together, present decisions with vigorous dissents within the Fifth and Seventh Circuits and in the Commission (4-1) and, in addition, inconsistencies between the Commission and the Fifth Circuit. The issues are obviously difficult ones. Prompt and authoritative resolution of those questions, Amici submit, is crucial to the continuing viability of federal and local regulation of cable television and "[to] provide[] the cable industry with the stability and certainty that are essential to its growth and development." H.R. Rep. No. 98-934 at 20.

Accordingly, the court should grant the City of Austin's ~~Dallas'~~ petition for certiorari but stay briefing on the merits pending the Seventh Circuit's disposition of the pending petitions for rehearing of its decision in City of Chicago v. FCC, 199 F.3d 424 (7th Cir. 1999).



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